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Institute for International Research on Criminal Policy
Ghent University

Prof. Dr. G. Vermeulen – Trafficking: Mainstream and Alternative International Legal Approaches – ISISC - ICL, 25/05/2010

Human Trafficking for Commercial Sexual Exploitation

Mainstream & Alternative International Legal Approaches relating to Constituent Elements, Liability of Legal Persons and International Cooperation in Criminal Matters

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Structure

- > gender-neutral criminal law approach
- > incriminations (constituent elements)
 - > in addition to core offence
 - > trafficking
 - > attention also given to related offences, such as
 - > prostitution
 - > child sexual abuse/exploitation & child pornography
- > liability of legal persons for the above offences
 - > importance
 - > preventative potential of quality standards & self-regulation
- > international cooperation in criminal matters (highlights)
- > conclusions



Approach

- > legal information (mainstreaming) & discussion (alternatives)
- > human rights focused from a labour/social security and emancipatory perspective, including for children (Tom Obokata: mainly victim-centered)
- > principal geographical levels of focus
 - > UN
 - > 2000 Trafficking Protocol to UN TOC Convention (Silke Albert)
 - > 1950 Convention on THB and exploitation prostitution
 - > 1989 CRC + 2000 2nd Optional Protocol
 - > CoE
 - > 2005 Warsaw Convention THB
 - > 2007 Lanzarote Convention child sexual exploitation/abuse
 - > EU
 - > 2002 FD THB trafficking in human beings + draft directive
 - > 2004 FD child sexual exploitation/abuse & porn + draft directive



Gender-neutral criminal law approach

- > however: particular vulnerability women
 - > feminization of poverty
 - > gender discrimination
 - > lack of educational/professional opportunities in home countries
- > specific attention to (criminal) status of exploitation in prostitution
 - > even then: gender-neutrality important
 - > also: male/boys prostitution
 - > increasing respect for women = false rationale for criminalization clients of prostitution



Trafficking (THB) vs smuggling

- > important that, even if phenomenologically often linked, substantive criminal law clearly distinguishes between
 - > smuggling of persons/migrants
 - > trafficking in persons
- > distinction relatively recent acquis at int'l levels (mainstream)
 - > UN level: since adoption 2000 Smuggling (SoM) and Trafficking (TiP) Protocols to UNTOC Convention
 - > CoE: since 2005 Convention
 - > EU: since mid-90ies
- > still: variety of (working) definitions trafficking and/or smuggling embedded in legal instruments or otherwise discussed at various international cooperation levels (UN, IOM, OSCE, ILO, CoE, EU)

THB: current mainstream definition (1)

- > 1st element = MOVEMENT
- > recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person
 - > even where no organised criminal group is involved
 - > even where no border is crossed
 - > even where the victim has legally entered, has legal residence in or is a national of the state where the trafficking occurs
 - > even where there is no profit motive



THB: current mainstream definition (2)

- > 2nd (CORE !) element = MEANS
- > where either, provided the person involved is not a child (i.e. a person below the age of 18), in which case the above conduct will constitute punishable trafficking even if none of the forthcoming means has been used
 - > use is made of coercion, force or threat, including abduction
 - > use is made of deceit or fraud
 - > there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved
 - > payments or benefits are given or received to achieve the consent of a person having control over another person
- > the consent of the person involved being irrelevant where any of these means has been used



THB: current mainstream definition (3)

- > 3rd element = ENVISAGED EXPLOITATION
- > for the purpose of (either)
 - > the exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude
 - > various perspectives and implementation differences
 - > the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography
 - > important int'l legal, policy and implementation differences
- > no consensus as to whether also for the purpose of
 - > organ transfer or removal (UN, COE and draft EU directive)
 - > exploitation of begging (unless labour-related?) (draft EU directive)
 - > exploitation of criminal activities (draft EU directive)
 - > adoption (2nd Optional Protocol CRC)



Smuggling, carrier liability, false documents

- important in migration debate to realize that continued reinforcing of the 'fortress idea', e.g. by
 - criminalizing counterfeiting of documents
 - introducing carrier liability
 - promoting even the incrimination of persons facilitating illegal entry, stay or residence on the basis of mere humanitarian grounds
 - e.g. EU FD facilitation unauthorised entry, movement & residence
- creates a very profitable market for smugglers
- is actually feeding the vulnerability exploited by smugglers and traffickers
- urgent need for legal migration possibilities (EU)



Prostitution (1)

- 1933 International Convention for the Suppression of the Traffic in Women of Full Age
 - prostitution stigmatised as to be morally reprehensible + adult women exempted from the right to freely agree to their exploitation in prostitution
- 1950 UN Trafficking Convention (1)
 - reinforced this attitude towards exploitation of prostitution
 - irrefutable presumption that women in prostitution could not have given their consent to such a practice
 - fact that the UN Trafficking Protocol only targets the exploitation of another (adult) person's prostitution against her/his will, does not affect that position, as the Protocol does not supersede the 1950 Convention



Prostitution (2)

- 1950 UN Trafficking Convention (2)
 - ambiguous attitude towards exploitation of a person's prostitution
 - reflecting a clear abolitionist (not: prohibitionist; opposed to: regulatory and decriminalisation) viewpoint
 - paradoxical situation that being a prostitute is not punishable (irresponsible for his/her actions, the question whether or not he/she has consented with being a prostitute, is irrelevant), whereas all aspects related to working as a prostitute, such as advertising or renting a room for providing sexual services, are (may be intended to protect the prostitutes against exploitation by third persons, the result however being exactly the opposite)



Prostitution (3)

- 1950 UN Trafficking Convention (3)
 - clearly maladjusted to changed attitude towards prostitution
 - must abolitionist tone make way for an approach in which the non-coercive and non-abusive employment and organisation of prostitution involving sufficiently mature or non-minors is internationally decriminalised?
 - states may have renounced or not ratified it
 - question (similar as for trafficking for the purpose of labour or sexual exploitation)
 - should a minor necessarily be considered to be under the age of consent to prostitute him/herself, where he/she has reached the legal age limit for having sexual intercourse, which usually is set below 18?



Labour and social security law perspective

- > more control on illegal employment by social inspection
 - > especially in prostitution and (adult) pornography sector
- > changes in labour/social security legislation
 - > with a view to clearer description of (sex) workers' rights
- > additional problem for victims employed and exploited in sex industry = UN 1950 Trafficking Convention
 - > prostitution, though in itself not punishable, is not being recognised as a proper profession, and therefore only tolerated in practice, whereas guaranteeing a better social status for prostitutes (and, as a result, protection against exploitation) implies regulating/recognizing their profession
 - > ECJ Jany November 2001: prostitution = economic activity



Child abuse/exploitation and pornography

- > abuse/exploitation/prostitution
 - > new in CoE and EU draft directive
 - > 'corruption' of children by making them witness 'sex'
 - > soliciting through ICT means (proposal followed by material acts)
 - > pornographic performances (including in front of webcam)
 - > only labeled altogether as exploitation for THB definition at CoE level
- > child pornography: production, distribution, dissemination, transmission, supplying, making available, acquisition and possession of and ICT access to child pornography, i.e.
 - > material that visually depicts or represents either
 - > a real child, a real person appearing to be a child or realistic images of a non-existent child involved or engaged in real or simulated sexually explicit conduct, including lascivious exhibition genitals/pubic area of a child
 - > new: any depiction for primarily sexual purposes of the sexual organs of a child (3 categories) (CoE + EU draft directive)



Exclusions from criminal liability

- > primarily for child pornography (chronological development)
 - > CoE Cybercrime Convention 2001: excluded if not without right
 - > EU 2004 FD: exclusion from criminal liability allowed where
 - > real person appearing to be a child was in fact 18 years of age or older at the time of depiction
 - > in the case of production and possession, images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use
 - > child pornography consisting of realistic images of a non existing child produced and possessed by the producer solely for his or her private use, as far as no pornographic material involving a child or a real person appearing to be a child has been used for the purpose of its production, and provided there is no risk for the dissemination of the material
 - > CoE Lanzarote Convention 2007: additional exclusion allowed where
 - > consensual inter-adolescent behaviour (for sexual abuse)
 - > 2nd indent EU 2004 FD
 - > pseudo or virtual child pornography
 - > EU draft directive: no exclusions any longer, but in case of consensual inter-adolescent behaviour (for sexual abuse and webcamsex)



Liability legal persons

- > important to provide that legal persons can be held liable of (facilitating) trafficking (commercial carriers, travel agencies, or - for some countries - brothels)
 - > UN Trafficking and Smuggling Protocols: criminal, civil or administrative liability
 - > EU FD's (and draft directives): criminal or non-criminal corporate liability for offences (infra)
 - > national extension of extra-territorial jurisdiction for offences committed for benefit of a legal person established in a state's territory, could be envisaged
- > quality standards for labour offices, marriage bureaux, escort agencies, travel agencies, brothels, ... ?
 - > Vermeulen, EU quality standards in support of the fight against THB and sexual exploitation of children. Exploratory study of the potential and feasibility of self-regulation and public-private co-operation, 2007, Antwerp-Apeldoorn, Maklu, 443 p.
 - > examples (Antwerp window prostitution protocol; Aphrodite agency)



International cooperation in criminal matters

- > related: no universal jurisdiction (good as is)
- > UN Trafficking Protocol
 - > UNTOC-related (organised criminal group + transnational) for international cooperation aspects
 - > whereas often non-organised or transnational
 - > Vermeulen & Van Damme, OC involvement in trafficking in persons and smuggling of migrants, 2010, Antwerp-Apeldoorn-Portland, Maklu, 112 p. (UNODC special issue)
- > controlled delivery
 - > only CoE prohibition for humans
- > int'l witness protection & video conference hearing (after return)
 - > usually not covered in multi-/bilateral conventions concluded with traditional countries of origin



Conclusions

- > international mainstream policy without proper gap analysis and targeted ex post monitoring
- > stronger focus on labour/social law potential
 - > regulatory approach of prostitution sector?
 - > through decriminalization or institutionlized non-prosecution of non-coercice/non-abusive or bona fide management or organisation of prostitution of and production of pornography involving adults (and minors above the age of sexual consent?)
- > + stimulating natural and legal persons to observe certain quality standards (best practice promotion)
 - > self-regulation or pps (+ control mechanism)
- > retaining criminal law approach for coercice/abusive or mala fide players
 - > including even against demand side actors knowingly using services that have no quality label (cfr CoE 2005 Warsaw Convention)
- > more (child) emancipation in addition to mere protection
- > highlights int'l cooperation in criminal matters



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Questions and discussion
